STATE OF MICHIGAN
MICHIGAN SUPREME COURT
APPEAL FROM COURT OF APPEALS
Jane E. Markey, Presiding Judge

DAVID SANCHEZ

Plaintiff-Appellant,
Cross-Appellee,

v

EAGLE ALLOY, INC. and
SECOND INJURY FUND
(DUAL EMPLOYMENT PROVISIONS)
Defendants-Appellees,
Cross-Appellant.

Supreme Court No.: 123114

COA No.: 238003

WCAC No.: 000-248

ALEJANDRO VAZQUEZ

Plaintiff-Appellant,
Cross-Appellee,

v

EAGLE ALLOY, INC.
(SELF INSURED)
Defendant-Appellee,
Cross-Appellant.

Supreme Court No.: 123115

COA No.: 239592

WCAC No.: 01-0182

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BRIEF ON APPEAL OF CROSS-APPELLANT, EAGLE ALLOY, INC.

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JURISDICTIONAL STATEMENT

Review of a Magistrate's Decision by the Workers' Compensation Appellate Commission is governed by the Michigan Constitution (Art. VI §28) and MCLA 418.861a(3), and which provides:

> Beginning October 1, 1986, findings of fact made by a workers' compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record. As used in this subsection, "substantial evidence" means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.

Review by this Honorable Court is governed by MCLA 861(a)(14), which provides:

> ...The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board, if application is made by the aggrieved party within 30 days after such order by any method permissible under the rules of the courts of the laws of this state.

The Court of Appeals issued its decision in this matter on January 7, 2003.

The plaintiffs filed a joint application for leave to appeal on January 22, 2003. Defendants filed a cross appeal on February 10, 2003.

Application for leave to appeal to the Supreme Court is permitted under MCR 7.302(D)(2).

On November 7, 2003 this Court issued an order granting plaintiffs' joint application for leave to appeal, and also granted defendant's application for leave to cross-appeal.

INDEX OF AUTHORITIES

STATUTES AND COURT RULES

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE MEANING OF THE WORD "ALIENS" IN THE FIRST CLAUSE OF MCL 418.161(1)(l) INCLUDES UNDOCUMENTED ILLEGAL ALIENS?**

Defendant-Cross-Appellant, Eagle Alloy, would answer "no"

Plaintiffs-Appellants, David Sanchez and Alejandro Vazquez, would answer "yes"

II. **WHETHER IN LIGHT OF ALL THE FACTS OF THIS CASE, INCLUDING THE WORK ACTUALLY PERFORMED BY THE PLAINTIFFS AND THEIR STATUS AS UNDOCUMENTED ALIENS, WERE THEY "UNDER ANY CONTRACT OF HIRE, EXPRESS OR IMPLIED" WITHIN THE MEANING OF MCL 418.161(1)(L)?**

Defendant-Cross-Appellant, Eagle Alloy, would answer "no"

Plaintiffs-Appellants, David Sanchez and Alejandro Vazquez, would answer "yes"

III. **WHETHER, IN LIGHT OF ALL THE FACTS OF THIS CASE, THE PLAINTIFFS WERE "UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF COMMISSION OF A CRIME," WITHIN THE MEANING OF THE FINAL SENTENCE OF MCL 418.361(1)?**

Defendant-Cross-Appellant, Eagle Alloy, would answer "no".

Plaintiffs-Appellants, David Sanchez and Alejandro Vazquez, would answer "yes".

IV. **WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE PLAINTIFFS SHOULD RECEIVE WORKER'S COMPENSATION BENEFITS UNTIL THE DATE WHEN THE DEFENDANT DISCOVERED THEIR STATUS AS UNDOCUMENTED ALIENS?**

Defendant-Cross-Appellant, Eagle Alloy, would answer "no".

Plaintiffs-Appellants, David Sanchez and Alejandro Vazquez, would answer "yes".

PAGE REFERENCES TO RECORD

SANCHEZ V. EAGLE ALLOY REFERENCES

Page references preceded by the letter "SD" refer to the deposition testimony of Mark DeHaan, M.D., taken on behalf of Defendant Eagle Alloy on February 15, 2000, in Grand Rapids, Michigan.

Page references preceded by the letter "SF" refer to the deposition testimony of Ronald Ford, M.D., taken on March 20, 2000, in Grand Rapids, Michigan.

Page references preceded by the letter "SO" refer to the Opinion and Order mailed by Magistrate Donna Grit on June 6, 2000. (Appendix 1)

Page references preceded by the letter "SO-2" refer to the Opinion and Order on remand mailed by Magistrate Donna Grit on July 2, 2001. (Appendix 3)

Page references preceded by the letter "ST" refer to the Trial Transcript from the trial, which commenced before Magistrate Donna Grit on March 23, 2000, and concluded on April 18, 2000.

Page references to the letters "SAC1" refer to the Opinion and Order of the Appellate Commission mailed April 12, 2001. (Appendix 2)

Page references to the letters "SAC2" refer to the Opinion and Order of the Appellate Commission mailed October 30, 2001. (Appendix 4)

Page references preceded by the letter "COA" refer to the Opinion and Order of the Court of Appeals issued on January 7, 2003. (Appendix 7)

VAZQUEZ V EAGLE ALLOY REFERENCES

Page references preceded by the letter "VK1" refer to the deposition testimony of Bert J. Korhonen, M.D. taken on behalf of Defendant Eagle Alloy on June 19, 2000, in Grand Rapids, Michigan.

Page references preceded by the letter "VK2" refer to the deposition testimony of Bert J. Korhonen, M.D. taken on behalf of Kelly Services, Inc. on February 15, 2001, in Grand Rapids, Michigan.

Page references preceded by the letter "VM" refer to the deposition testimony of John A. Mulder, M.D., taken on behalf of Defendant Eagle Alloy for purposes of cross-examination on June 29, 2000, in Muskegon, Michigan.

Page references preceded by the letter "VO" refer to the Opinion and Order mailed by Magistrate Donna Grit on April 5, 2001. (Appendix 5).

Page references preceded by the letter "VA" refer to the Appellate Commission's decision mailed on January 25, 2002. (Appendix 6)

Page references preceded by the letter "VP" refer to the deposition testimony of Martin M. Pallante, M.D., taken on behalf of Plaintiff Alejandro Vazquez on June 12, 2000, in Muskegon, Michigan.

Page references preceded by the letter "VT" refer to the Transcript of Proceedings from the trial, which proceeded before Magistrate Donna Grit on February 22, 2001, in Muskegon Heights, Michigan.

Page references preceded by the letter "COA" refer to the Opinion and Order of the Court of Appeals issued on January 7, 2003. (Appendix 7)

PROCEDURAL HISTORY

SANCEZ V EAGLE ALLOY INC.

Plaintiff's Application for Mediation or Hearing

Plaintiff David Sanchez's initial Application for Mediation or Hearing was filed with the Bureau on August 23, 1999, alleging a September 29, 1998, date of injury. He specifically alleged a right hand crush injury as a result of his employment with Eagle Alloy. This Application was amended on September 17, 1999, to include entitlement to specific loss benefits pursuant to Section 361(2)(h).

On November 5, 1999, Defendant Eagle Alloy filed a petition seeking recoupment from the plaintiff of all benefits paid and also reimbursement from the Second Injury Fund/Dual Employment Provisions for benefits previously paid based upon dual earnings. The case was tried on March 23 and April 18, 2000.

Magistrate's Opinion and Order

By Opinion and Order mailed June 6, 2000, Magistrate Donna Grit found that Plaintiff Sanchez was entitled to wage loss benefits through August 6, 1999. Magistrate Grit determined that as of August 6, 1999, he lost his entitlement to ongoing wage loss benefits for as long as he remained in the United States as an illegal alien, pursuant to Section 361 of the Act. It was also ordered that the Fund shall reimburse Eagle Alloy their proportional share of the indemnity benefits paid, pursuant to the statutory language of section 372. Eagle Alloy remained liable for medical expenses until further order of the Bureau.

A. Claim for Review

Plaintiff David Sanchez filed a claim for review contesting Magistrate Grit's decision. Therein, he argued that his status as an "undocumented worker" did not preclude his entitlement to weekly indemnity benefits pursuant to Section 361(1) of the Workers' Compensation Act.

B. Appellate Commission's Opinion and Order

By Opinion and Order mailed April 12, 2001, a divided Workers' Compensation Appellate Commission (2-1) affirmed the Magistrate's decision in part, reversed in part, and remanded it back to the Magistrate. Specifically, the Appellate Commission reversed the decision denying continuing wage loss benefits based on Section 361 and remanded the case for a determination of whether the plaintiff is entitled to any continuing weekly wage loss benefits as a result of his injury. The Appellate Commission indicated that the parties would have 45 days from the date of the Magistrate's decision on remand to prepare supplemental briefs.

C. Magistrate's Second Opinion and Order.

By Opinion and Order on remand mailed July 2, 2001, Magistrate Donna Grit found that the plaintiff did not voluntarily remove himself from the workforce and was therefore entitled to ongoing wage loss benefits.

D. Appellate Commission's Second Opinion and Order.

By Opinion and Order mailed October 30, 2001 a divided Appellate Commission (2-1) affirmed and modified the Magistrate's decision (After Remand). Specifically, the Appellate Commission affirmed the magistrate's finding that plaintiff continues to be disabled from a September 29, 1998 injury date, from returning to his job at Eagle Alloy and West Michigan Steel because of his injury. Also, he is entitled to worker's compensation benefits although he is an illegal alien and misrepresented himself by fraud when hired. Also he is entitled to benefits since he was terminated because he revealed to the employer that he had fraudulently misrepresented his status in violation of Federal Law. The Appellate Commission modified the magistrate's decision to reflect that the plaintiff has a continuing compensable partial disability despite his illegal return to subsequent work at Manpower.

VAZQUEZ V EAGLE ALLOY INC.

A. Plaintiff's Applications for Mediation or Hearing; Defendant Eagle Alloy's Form C Petition

Plaintiff Alejandro Vazquez's initial Application for Mediation or Hearing was filed with the Bureau on May 4, 1999, alleging January 27, 1999 and March 29, 1999 dates of injury. He specifically alleges a left shoulder injury as a result of his employment with Eagle Alloy.

Plaintiff Alejandro Vazquez also filed an Application for Mediation or Hearing against Integrated Metal Technology, Inc. It was subsequently determined that the appropriate employer was a temporary agency, Olsten. Mr. Vazquez alleged an injury of "10/99." He claimed he was doing assembly work and the highly-repetitive activity

significantly caused, contributed to, or aggravated a preexisting left shoulder upper extremity disability. This employment was subsequent to Mr. Vazquez's employment at Defendant Eagle Alloy.

Defendant Eagle Alloy in November 2000 filed an Application for Mediation or Hearing – Form C seeking a determination whether claimant aggravated his left-shoulder condition with subsequent employment at Kelly Services. The Form C Application was filed against Kelly Services alleging a September 2000 date of injury.

Defendant Olsten and Defendant Kelly Services redeemed their cases with Plaintiff Alejandro Vazquez on the morning of trial. On that morning, February 22, 2001, Defendant Olsten and Defendant Kelly Services each paid $500 to plaintiff as part of the redemption proceedings. The redemption was heard immediately prior to commencing the trial proceedings involving Defendant Eagle Alloy.

B. Magistrate's Opinion and Order

By Opinion and Order mailed April 5, 2001, Magistrate Donna Grit found that Plaintiff Vazquez was entitled to wage loss benefits through October 16, 1999. As of October 16, 1999, he thereafter lost his entitlement to ongoing wage loss benefits, because of his status as an illegal alien and inability to obtain or perform work due to commission of a crime, pursuant to Section 361.

C. Claims for Review

Both Plaintiff Alejandro Vazquez and Defendant Eagle Alloy filed claims for review contesting Magistrate Grit's decision.

D. Appellate Commission's Opinion/Order

By opinion/order mailed on January 25, 2002 the Appellate Commission, En

Banc, affirmed the decision of the magistrate with modification. The Appellate Commission agreed with the magistrate that plaintiff was not entitled to benefits pursuant to section 361, however the Commission modified the award, denying all benefits (including the closed period awarded by the magistrate) until such time as the plaintiff acquires documented status to work.

THE MICHIGAN COURT OF APPEALS DECISION

Both Sanchez and Vasquez were appealed to the Michigan Court of Appeals. Since the issues in both cases were essentially identical, the Court of Appeals consolidated the two cases. On January 7, 2003, the Michigan Court of Appeals held that both Sanchez and Vazquez's admitted use of fake documents to obtain employment constituted "commission of a crime." However, the Court of Appeals agreed with the Magistrate's reasoning that benefits were only suspended from the date the employer actually learned of the employee's illegal status.

MICHIGAN SUPREME COURT ORDER

On November 7, 2003 this Court issued an order granting plaintiffs' joint application for leave to appeal, and also granted defendant's application for leave to cross-appeal.

STANDARD OF REVIEW

The Magistrate's Decision must be supported by competent, material, and substantial evidence on the whole record as required under MCLA 418.861 a (3); MSA 17.237 (861 a (3)). This is also consistent with the Michigan Constitution (Art. IV §28, 1963). *See Aquilina v General Motors Corporation*, 403 Mich 206 (1978); *Farrington v Total Petroleum*, 442 Mich 201 (1993).

Pursuant to MCL 418.861a(13), the Appellate Commission reviews the findings of a magistrate to determine whether they were supported by competent, material, and substantial evidence on the whole record. Such review requires both a quantitative and qualitative analysis of the evidence. MCL 418.861a(13). "Substantial evidence" in this context means such evidence, considering the whole record, as a reasonable mind would accept as adequate to justify the conclusion. *Holden v Ford Motor Company*, 439 Mich 257 (1992); *MERC v Detroit Symphony Orchestra*, 393 Mich 116 (1974).

In the recent case of *Mudel v Great Atlantic & Pacific Tea Company*, 461 Mich 691 (2000), the Supreme Court further clarified the standard of review in a worker's compensation case. In that case, the Supreme Court affirmed its finding in *Holden v Ford Motor Co.*, 439 Mich 257 (1992). In other words, it confirmed that the Appellate Commission must review the magistrate's decision under the "substantial evidence" standard. The Court held that the "'substantial evidence' standard, governing the WCAC's review of the magistrate's findings of fact, provides for review which is clearly more deferential to the magistrate's decision than the de novo review standard previously employed. Nevertheless, the WCAC has the power to engage in both a 'qualitative and quantitative' analysis of the 'whole record,' which means that the WCAC need not

necessarily defer to all the magistrate's findings of fact." The statute grants the Appellate Commission fact-finding powers, and permits it to substitute its own findings of fact for those of the magistrate, if the Appellate Commission accords different weight to the quality or quantity of evidence presented.

In contrast, the Court of Appeals and Supreme Court must review the Appellate Commission's Decision under the "any evidence" standard. If there is any evidence supporting the Appellate Commission's factual findings, and if the Commission did not misapprehend its administrative appellate role, then the courts must treat the Appellate Commission's factual findings as conclusive.

Michigan Appellate Courts have the power to review questions of law in any final order of the WCAC de novo. *Goff v Bil-Mar Foods, Inc.*, 454 Mich 507, 512-514 (1997); MCL 418.861a (14); MSA 17.237 (861a) (14).

STATEMENT OF FACTS

SANCHEZ V EAGLE ALLOY INC.

Plaintiff-Appellant David Sanchez was born December 9, 1957, and testified that he is right-hand dominant. (ST 20) His Application alleges that he is married and has seven dependents. The Plaintiff came to the United States in 1989 as an illegal alien and worked in California for approximately seven years. (ST 15)

Plaintiff Sanchez testified that upon arriving in California he purchased a fake social security card for $30 (ST 17). He thereafter fraudulently obtained a California driver's license. (T 28) Plaintiff Sanchez freely acknowledged at trial that he is an illegal alien. (ST 28).

Upon his arrival in Michigan, the Plaintiff provided Eagle Alloy false documentation and commenced full-time employment at Eagle Alloy in March 1997. He worked simultaneously at West Michigan Steel.

Each employer was provided with a copy of the Plaintiff's fraudulent social security card and fraudulent California driver's license as proof of his legal resident status. He also signed an employment form stating that "under penalty of perjury" he was a "lawful permanent resident" of the United States. (ST 33, 35; *see* defendant Eagle Alloy's trial exhibit C) The Plaintiff further attested under the penalty of perjury on a U.S. Department of Justice Employment Eligibility Verification form, that he had a valid social security number and a valid Alien ID number. (*See* defendant Eagle Alloy's trial exhibit B and E).

The Plaintiff testified that his work at West Michigan Steel was heavier than that at Eagle Alloy. At West Michigan Steel he did grinding work wherein he would hold parts that weighed from 3-to-25 pounds against a large grinding wheel. He estimated that he would grind 800 small parts in a four-hour period or 200-to-300 large parts in a four-hour period.

The work at Eagle Alloy was lighter and required less intensive use of the hands and upper extremities. Although hired to do grinding, he was transferred to the core department where he inserted small parts weighing less than a pound into machinery.

Plaintiff Sanchez alleges that he suffered an injury to his right hand on September 29, 1998, while working at Eagle Alloy. He testified that a machine shut on his right hand. (ST 20) His hand was evidently caught between two heated metal plates and he suffered a crush-burn-type injury. (SO 4) Thereafter, Dr. Ronald Ford MD performed surgeries on October 21, 1998, November 6, 1998, December 2, 1998, and finally on July 7, 1999. (SF 5-10) Aggressive physical therapy after this final July 1999 operation provided continued improvement. Dr. Ford released the plaintiff to return to restricted part-time work as of April 1, 1999, (F 15-16) and released him with "no limitations" in September or October 1999 (SF 17-18).

When the plaintiff returned to Eagle Alloy on August 6, 1999, personnel manager Connie Larson told the Plaintiff that his fraudulent social security number precluded his further employment. (ST 23) Ms. Larson testified that the company had received notice from the Social Security Administration in June 1999 advising them of the plaintiff's invalid social security number. (*See* Defendant Eagle Alloy's Trial Exhibit G). Thereafter, all employees with invalid numbers, including the plaintiff, were given until August 13, 1999 to demonstrate their legal resident status. (*See* Defendant Eagle Alloy's Trial Exhibit H). When confronted, the plaintiff acknowledged that his social security card was not legitimate and that he was an illegal alien. At that point, Ms. Larson informed the plaintiff that Eagle Alloy could no longer legally employ him, because it was prohibited by Federal Law. She

nonetheless testified that Eagle Alloy felt they had a moral obligation to plaintiff Sanchez and she therefore told him that they would pay for any hand-related medical problems for the rest of his life. She further informed him that they would like to reemploy him if, and when, he became legal. (ST 77-82)

The plaintiff in fact illegally returned to full time employment with Manpower as of December 1999. (SO 7)

Hand specialist Mark DeHaan, MD saw plaintiff Sanchez for an independent medical examination, on January 18, 2000. This physician noted that the plaintiff was working at that time for approximately four weeks at Finish Manufacturing, through Manpower. (SF 11) Dr. DeHaan testified that the plaintiff had reached maximum medical improvement and would not require additional care other than a possible future surgery to revise the web spaces of the fingers. (SD 15) Dr. DeHaan noted that the plaintiff's hand had normal color, temperature, and sweat pattern. He further testified that there were no unusual masses and no muscle atrophy. (SD 13-14) Although the doctor testified that forceful, repetitive gripping with the right hand could be problematic, he nonetheless felt that the plaintiff could return to work doing his previous jobs. (SD 16-20)

VAZQUEZ V EAGLE ALLOY INC.

A. Trial Testimony of Plaintiff Alejandro Vazquez

Plaintiff Alejandro Vazquez was born July 18, 1977 was not married and did not claim any dependents. (VT at 11). Mr. Vazquez immediately conceded that he does not have a valid Social Security number. VT at 11, 14. Plaintiff testified that he has been in America for four years. (VT at 39). He came to America through Tijuana and into California where he purchased a fake Social Security card. Thereafter, he purchased a fake alien card in Chicago,

Illinois. (VT at 39). Mr. Vazquez conceded that he provided the fake Resident Alien Card and fake Social Security card to Eagle Alloy as part of his application for employment. T at 14. Mr. Vazquez conceded that these cards are not true. (VT at 14).

Mr. Vazquez conceded that he knew he was an illegal alien when he advised Eagle Alloy that he wanted to work for them. (VT at 40). He presented the two cards to Eagle Alloy so they would think that he was a legal resident alien and he wanted Eagle Alloy to believe that these cards were valid. (VT at 40).

Mr. Vazquez commenced his employment at Eagle Alloy in April 1998. (VT at 14). Mr. Vazquez was employed as a grinder. (VT at 16). Particularly, he performed activities as both a snag grinder and a pencil grinder. (VT at 16). Although Mr. Vazquez did not know the weights of the parts involved, he testified that the job required him to pick up or lift parts and place them against a grinder. (VT at 17).

Mr. Vazquez testified that he did not have any trouble performing his work prior to an injury, which he alleges occurred on January 27, 1999. (T at 18-20). However, Mr. Vazquez reluctantly conceded ("probably they talked to me about that") that on January 6, 1999, he was provided with a written warning regarding attendance problems. Accordingly, Mr. Vazquez's attendance problems commenced prior to the alleged specific incident injury on January 27, 1999.

On January 27, 1999, Mr. Vazquez testified that he was working as pencil grinder when he lifted a part and felt pain in his left shoulder. (VT at 19-21). Mr. Vazquez testified that he sought treatment that day at Hackley Occupational Health Clinic. (T at 21). Restrictions were imposed and Mr. Vazquez returned to work under restriction. (VT at 22). Particularly, when Mr. Vazquez returned to work he performed full-time activities as a

painter, using only his unaffected right upper extremity. (T at 22). He testified that the jobs he performed subsequent to January 27, 1999 did not significantly worsen his left shoulder condition. (VT at 22). Mr. Vazquez continued to work on a regular basis at Eagle Alloy under the restrictions either imposed by Hackley Hospital or Dr. Mulder. (VT at 22).

Mr. Vazquez continued to perform work provided to him by Eagle Alloy within his restrictions. (VT at 43). However, his attendance problems continued. On direct-examination, he recalled being counseled regarding an unexcused absence on March 9, 1999. (VT at 23-24). He recalled signing a March 11, 1999 "Pretermination Notice" providing that one more unexcused or two more excused absences between March 11, 1999 and June 9, 1999 would result in a termination hearing. (VT at 43-44).

Thereafter, trial testimony next focused upon the facts and circumstances surrounding Mr. Vazquez's absence from employment on April 2, 1999. The nature of the absence is important because of the March 11, 1999 "Pretermination Notice." Mr. Vazquez worked on April 1, 1999, which was a Thursday. (VT at 44-45). Mr. Vazquez did not dispute the fact that he saw Dr. Pallante on April 2, 1999. (VT at 26). Mr. Vazquez testified that he went to see Dr. Pallante on April 2, 1999, and then did not go back to work. Mr. Vazquez testified that he did not go back to work following the appointment on April 2, 1999 with Dr. Pallante because he "wanted to go home and take care of my children." (VT at 46). Although Mr. Vazquez was provided restrictions at the time of his appointment with Dr. Pallante on April 2, 1999, those restrictions only involved the left upper extremity. (VT at 47). Mr. Vazquez conceded the work he was performing at the time for Eagle Alloy (painting) only involved the right hand and there was no use of the left hand. (VT at 46). Mr. Vazquez conceded that he saw Dr. Pallante in the "morning" of April 2, 1999. (VT at 45). The transcript does not

reflect any testimony that Mr. Vazquez contacted the employer to advise that he would not be reporting to work on April 2, 1999.

Thereafter, April 3, 1999 was a Saturday, and April 4, 1999 was a Sunday. Mr. Vazquez did not testify that he was scheduled for work, and no testimony was presented that he missed any scheduled work on these days. Monday, April 5, 1999 was a scheduled workday, however; Mr. Vazquez was absent and did not contact Eagle Alloy and provide a reason for his absence. (VT at 49). Mr. Vazquez testified that he suffered a left ankle injury at home on Saturday, April 3, 1999, and provided a restriction slip (for the left ankle) to Eagle Alloy on Tuesday, April 6, 1999. (VT at 49-50). Mr. Vazquez testified that he did work on Tuesday, April 6, 1999, but could not recall if he worked the entire shift. T at 50.

Thereafter, Mr. Vazquez testified that he recalled attending a termination hearing. VT at 27). He acknowledged that Connie Larson was present at the meeting. (VT at 27). When questioned whether he felt he was fired or whether he quit, Mr. Vazquez testified that he was fired. (VT at 27). Mr. Vazquez understood that they were terminating him because of his attendance problems. (VT at 51). Mr. Vazquez testified that he could not remember if he ever went back to Eagle Alloy after he was fired to provide them with medical slips. (VT at 28). He never contacted Eagle Alloy after his termination hearing to offer himself back to work doing work that he could handle given his left shoulder condition. (VT at 28). Mr. Vazquez testified that at the time of his departure from his employment at Eagle Alloy, his shoulder was still bothering him. (VT at 29).

Thereafter, Mr. Vazquez went to work for Olsten, a temporary agency. (VT at 30). They placed him at several different employers. (VT at 31). The first employer Mr. Vazquez worked for was Integrated Metal. (VT at 31). He was employed as an assembler of file

cabinets, placing the tops on the drawers. Although Mr. Vazquez did not recall how long he worked for Integrated Metal through Olsten, he testified that the work "bothered my shoulder so I had to leave." (VT at 31). Mr. Vazquez testified that the work caused a problem for his shoulder when he had to lift his arm to turn over the cabinets. (VT at 53). He was working on two- and three-drawer metal filing cabinets. (VT at 53). Mr. Vazquez stopped this job because of his shoulder pain. (VT at 54). The kind of pain that he was having is similar to the pain he testified he was presently having. (VT at 54). Following his work at Integrated Metal, and before his next employer, he testified that his left shoulder "calmed down a bit." (VT at 31).

Thereafter, Mr. Vazquez had employment at Donnelly Corporation, Grand Haven Stamped Products, Acemtech, and Dymet. Mr. Vazquez also testified that he had employment at Meridian.

The above-identified employment commencing with Integrated Metal and ending with Dymet, all occurred through the placement services of Olsten. However, Olsten ended its relationship with Mr. Vazquez after it learned that he was an illegal alien. Mr. Vazquez conceded that he would have continued to work for Olsten if they had not discharged him after they learned that he was an illegal. (VT at 54).

In the sequence of employers, the next employer was Gyro Power Coating. Mr. Vazquez was placed in this employment through Kelly Services. Mr. Vazquez testified that his job was to hang parts to be painted on a moving line. (VT at 35). This job caused pain in his shoulder, which forced him to quit. (VT at 35). The job required Mr. Vazquez to hang parts at face level. (VT at 60). Mr. Vazquez testified that the repetitive nature of the job caused his shoulder to bother him. (VT at 60). Mr. Vazquez testified that some of the parts he

had to hang were greater than five pounds, and some were less than five pounds. (VT at 61). The rate at which he had to hang these parts was more rapid with the smaller parts and slower with the larger parts. (VT at 61).

Mr. Vazquez testified that he had to quit the job at Gyro Power Coating after two weeks because "I was starting to take a lot of pills for the pain." (VT at 61-62). He was having shoulder pain by the second week of the employment. (VT at 62).

Mr. Vazquez acknowledged that his employment through Kelly Services, at Gyro Power Coating, was for a period of about two weeks in July 2000. (VT at 58). Plaintiff conceded that although he could not remember the month, he did recall visiting Dr. Pallante after he left Gyro Power Coating and before his next employment. Mr. Vazquez recalls telling Dr. Pallante that his shoulder hurt, and did not recall telling him if it "was a whole lot worse or what." (VT at 63). Mr. Vazquez recalled that he saw Dr. Pallante during this period of time for shoulder pain, "hoping he'd give me some medicine to make it better." (VT at 63). Mr. Vazquez has not seen a doctor since seeing Dr. Pallante in September 2000. (VT at 64).

Thereafter, Mr. Vazquez acknowledged that he worked for Wise, another employment service, that placed him at Fleet. He worked for approximately two days in November 2000. (VT at 64). He stopped working because the company ran out of work. T at 64.

Since the brief employment through Wise at Fleet in November 2000, Mr. Vazquez indicated that he has called Wise on the phone seeking additional employment activities. Mr. Vazquez conceded that he has never asked to go back to work at Eagle Alloy since he was

terminated on April 7, 1999. (VT at 66). He had not seen a doctor at the time of trial since seeing Dr. Pallante on September 12, 2000. (VT at 63-64).

On the morning of the subject trial, which occurred on February 26, 2001, Mr. Vazquez testified that he settled his claims with Olsten and Kelly. (T at 66).

B. Trial Testimony of Connie Larson

Defendant called Ms. Connie Larson as a witness at the time of trial. Ms. Larson has been employed as the treasurer at Eagle Alloy since February 2000 and before that performed duties as the office manager for 15 years. (VT at 70).

Ms. Larson testified that Mr. Vazquez applied for employment at Eagle Alloy on April 1, 1998. (VT at 71). Ms. Larson testified that as part of the hiring practice, she obtains a copy of a picture ID and the applicant's Social Security card. (VT at 71). Based upon the Resident Alien card and Social Security card presented by Mr. Vazquez, he was hired by Eagle Alloy based upon these representations that he had legal status to work. (VT at 73). Ms. Larson would not have hired him if he was an illegal because the company does not knowingly hire illegal aliens. (VT at 73). Ms. Larson completed a W-4 form as required by the IRS for withholding federal tax; Ms. Larson used the Social Security number provided by Mr. Vazquez. (VT at 74).

Ms. Larson, proceeding chronologically, next testified that on January 6, 1999, she provided a written warning to Mr. Vazquez regarding his attendance. (VT at 76).

Next, another warning was provided to Mr. Vazquez on March 11, 1999. This written disciplinary action, entitled "Pretermination Notice", provided that should Mr. Vazquez have

one more unexcused or two more excused absences prior to June 9, 1999, he would be the subject of a termination hearing. (VT at 76).

As Mr. Vazquez had an unexcused absence on April 2, 1999, the testimony next shifted to the facts and circumstances surrounding Mr. Vazquez's last full day of work on April 1, 1999. Ms. Larson testified that Mr. Vazquez worked a full day on Thursday, April 1, 1999. (VT at 76). Ms. Larson conceded that she heard Mr. Vazquez's testimony that he saw Dr. Pallante on the morning of April 2, 1999, received a slip, and then did not return to work that day. (VT at 76). This testimony from Mr. Vazquez is consistent with Ms. Larson's records. (VT at 76). However, Ms. Larson was able to testify that the appointment with Dr. Pallante was at 8:45 a.m. on April 2, 1999. (VT at 77). Mr. Vazquez's shift that day, April 2, 1999, ran from 7:25 a.m. through 3:25 p.m. (VT at 77).

Ms. Larson testified that Mr. Vazquez did not contact Eagle Alloy after seeing Dr. Pallante on April 2, 1999; accordingly, this was considered an unexcused absence. (VT at 77). Ms. Larson explained that this was considered an unexcused absence because although employees are allowed to go to their doctors' appointments, they are then expected to bring the paperwork from the doctor back to Eagle Alloy so that Eagle Alloy can determine whether or not work is available within any limitations imposed by the physician. (VT at 77). Ms. Larson testified that on April 2, 1999, Dr. Pallante imposed the same restrictions that he had imposed previously, and Eagle Alloy continued to have work for him to perform. (VT at 78). Eagle Alloy had work available for Mr. Vazquez on April 2, 1999 following his doctor appointment with Dr. Pallante. (VT at 78). Particularly, this work was right hand only painting, and Ms. Larson had this work available on April 2, 1999; April 5, 1999; April 6,

1999 and thereafter. (VT at 78). Eagle Alloy had employment available to Mr. Vazquez since his January claimed date of injury. (VT at 78).

Noting that April 3, 1999 was a Saturday, on Monday, April 5, 1999 plaintiff did not report to work or turn in a disability slip. (VT at 78). Accordingly, there was no contact with claimant on Monday, April 5, 1999. On Tuesday, April 6, 1999, Ms. Larson testified that her payroll records showed that Mr. Vazquez worked 2.9 hours. It was on this date that Mr. Vazquez was suspended from his employment due to his attendance problems. (VT at 79).

On April 8, 1999, Ms. Larson met with Plaintiff Vazquez. At that time, Mr. Vazquez was terminated and it was explained to him exactly why the termination was taking place. (VT at 82). He was terminated for attendance problems, and particularly missing work on Friday, April 2, 1999, when he did not return to work after seeing Dr. Pallante. (VT at 82). As Ms. Larson explained, this was the final step in Eagle Alloy's attendance program, and missing work without excuse or notification on April 2, 1999 was the final reason for the termination. (VT at 82).

Ms. Larson acknowledged that she received notice that as of October 14, 1999, Mr. Vazquez's attorney acknowledged that his client was an illegal alien. (VT at 85). Ms. Larson testified that she has not been able to offer Mr. Vazquez light-duty or favored employment since October 14, 1999, when she found out that Mr. Vazquez was an illegal. (VT at 85). She has been unable to offer light-duty work simply because he is illegal. (VT at 85). Ms. Larson has in other cases considered favored work and provided favored work in workers' compensation claims. T at 85. Similarly, Ms. Larson testified that she felt it would be inappropriate to ask a rehabilitation company to assist in the placing of an illegal alien. (T at 85-86).

C. Testimony of Bert J. Korhonen, M.D., taken June 19, 2000

Dr. Korhonen is a board certified orthopedic surgeon who examined Mr. Vazquez at the request of Eagle Alloy on October 26, 1999. (VK1 at 8). At the time of the examination, Mr. Vazquez provided a history of an injury on January 22, 1999 when he was lifting a part at work. When he lifted this object, Mr. Vazquez advised that it felt like his left shoulder popped. (VK1 at 9). Dr. Korhonen's report indicates that he reviewed x-rays of both the right and left shoulders taken February 15, 1999. (VK1 at 12). The x-rays revealed a third-degree AC separation on the left side with obvious calcific radiodensities inferior to the distal clavicle and in the area of the AC joint on the left side.

Dr. Korhonen opined in his report, which was typed into the record at the time of the deposition, that Mr. Vazquez suffered an AC separation, third-degree, on the left side as documented on the x-rays. (VK1 at 12). It was Dr. Korhonen's opinion that this condition was longstanding, based upon the sclerotic changes that had occurred on both sides of the AC separation, as well as the radiopacity showing attempts of the body to repair the trapezoid ligament. (VK1 at 12).

At the time of the deposition of Dr. Korhonen on June 19, 2000, he had possession of the x-rays taken February 15, 1999, and reviewed them immediately prior to the deposition. (VK1 at 13). It was Dr. Korhonen's opinion that the pathology identified in the left shoulder x-ray preceded anything that happened at work on or about January 22, 1999. (VK1 at 13). Dr. Korhonen was of this opinion because of the sclerotic changes that occurred on both sides of the AC separation and, additionally, other findings indicating the body's attempts to repair the trapezoid ligament as well as the AC joint capsular structures. Dr. Korhonen

believed that the findings on x-ray did produce symptoms prior to the alleged date of injury. (VK1 at 14).

With respect to a history, Dr. Korhonen advised that Mr. Vazquez provided a history that he did not recall any prior injuries to his left shoulder. (VK1 at 14). Dr. Korhonen opined that a third-degree AC separation would require a major blunt injury to the joint, and following such an event an individual would not be asymptomatic. (VK1 at 14). Dr. Korhonen was directly questioned regarding whether Mr. Vazquez's history of lifting a part could cause a third-degree separation. Dr. Korhonen's opinion was that it would not, as it would take a blunt injury such as a direct fall on the shoulder to cause a third-degree separation. (VK1 at 15). A third-degree separation is the worse possible separation, and means that the AC joint has been totally disrupted, including total disruption of the trapezoid ligament. (VK1 at 14).

On cross-examination, Dr. Korhonen did not agree that a third-degree separation could occur as a result of heavy lifting with one arm. (VK1 at 19). Dr. Korhonen conceded that had Mr. Vazquez been employed for one year prior to the incident with use of his upper extremities including heavy lifting in an unrestricted fashion, that type of history would suggest against an old injury. (VK1 at 19). Dr. Korhonen testified that the history of incident on January 22, 1999 indicated that Mr. Vazquez had an AC separation for a long time and that he may have had a symptomatic episode. (VK1 at 20).

Dr. Korhonen conceded on cross-examination by counsel for Olsten that Mr. Vazquez did not provide a history of any subsequent employment altering or worsening his condition. (VK1 at 23). However, Dr. Korhonen was not impressed that Mr. Vazquez's description of injury was related to any event occurring in January 1999. (VK1 at 22).

D. Testimony of Martin M. Pallante, M.D., taken June 12, 2000

Dr. Pallante is a board certified orthopedic surgeon practicing in Muskegon. Counsel for plaintiff took his deposition.

Dr. Pallante testified that Mr. Vazquez had a Grade 3 separation of the AC joint based upon the patient's history of a feeling of a pop in the shoulder with a change in the appearance of the shoulder at the time, with the pain that developed, based upon examination, and based upon the x-ray films. (VP at 8-9). Dr. Pallante's deposition was taken June 12, 2000, and he had not reviewed the x-ray films since March 3, 1999. (VP at 9). Dr. Pallante did not recall noticing any unusual calcifications at the time he looked at the x-ray films. (VP at 10).

Dr. Pallante testified, based upon hypothetical questioning, that it was his opinion that the incident in question in January 1999 either was the cause of the Grade 3 AC separation or significantly exacerbated some prior injury. (VP at 13). Dr. Pallante also testified that if Mr. Vazquez had a preexisting AC joint separation but was working pain-free with an acute significant change associated with feeling a pop and swelling and tenderness, the particular incident in question would have caused a significant exacerbation or aggravation of the previous injury. (VP at 14). Dr. Pallante last examined Mr. Vazquez on June 9, 2000.

Dr. Pallante, during the course of time he has treated Mr. Vazquez, has never released him to unrestricted activity. (VP at 15). Dr. Pallante felt that without surgery Mr. Vazquez will probably have some slow improvement for another year and the need for surgery will be made at that time. (VP at 15-16).

On questioning by counsel for Olsten, Dr. Pallante testified that a direct blow to the shoulder most often causes a third-degree AC separation. However, five to ten percent of the time, heavy lifting where there is enough stress transferred to the acromion can cause it to pull away from the clavicle. (VP at 19). Dr. Pallante testified that there have been several incidents where Mr. Vazquez has had a temporary increase in symptoms but nothing that significantly changed the baseline symptoms for any length of time. (VP at 19). Mr. Vazquez's restrictions were essentially the same in June of 2000 as they were in June of 1999. (VP at 20).

D. Testimony of John A. Mulder, M.D., taken June 29, 2000

Plaintiff's counsel's proposed submission of the records from Dr. Mulder pursuant to Rule 5, and Defendant Eagle Alloy convened the deposition of Dr. Mulder for purposes of questioning the witness on cross-examination.

Dr. Mulder examined Mr. Vazquez on February 15, 1999, and referred him for x-rays of the left shoulder. (M at 5-6). Dr. Mulder did not review the films, but conceded that the report simply indicated a left AC separation and did not indicate whether the separation was fresh or whether there had been some sclerotic changes around the margin of the separation. (M at 6).

Dr. Mulder was provided with copies of the x-ray films he ordered taken on February 15, 1999, and took the opportunity to review them at the time of the deposition. Based on his review of the films, Dr. Mulder indicated that he did not have an opinion regarding whether the left AC separation had existed prior to the alleged specific-event injury in January 1999.

(VM at 8-9). At the time of Dr. Mulder's examination of Mr. Vazquez on February 15, 1999, Mr. Vazquez did not have any signs of left shoulder impingement. (VM at 11).

On redirect-examination, Dr. Mulder indicated that Mr. Vazquez did not report any shoulder problems at the time of the December 1998 office visit. (VM at 14). Dr. Mulder believed that the shoulder separation was related to the work incident, which occurred a week-and-a-half or two-weeks prior to the February 15, 1999 office visit. (VM at 14).

F. Testimony of Bert J. Korhonen, M.D., taken February 5, 2001.

Counsel for Kelly Services convened the deposition of Dr. Korhonen on February 15, 2001. Dr. Korhonen examined Mr. Vazquez on January 9, 2001, and authored a report dated February 5, 2001 addressed to counsel for Kelly Services. (VK2 at 8). Dr. Korhonen previously examined Mr. Vazquez on October 11, 1999. (VK2 at 9).

Dr. Korhonen testified that between the time of his two examinations, Mr. Vazquez had overcome some of the atrophy that was initially present. (VK2 at 11). Mr. Vazquez provided a history of a continuation of the pain that he had had ever since January 1999. (VK2 at 12). Mr. Vazquez did not report any new injuries. (VK2 at 12). Dr. Korhonen testified that he did not see any acceleration or worsening of Mr. Vazquez's condition. (VK2 at 13).

Counsel for plaintiff questioned Dr. Korhonen regarding restrictions, and Dr. Korhonen opined that Mr. Vazquez might have symptoms if he were "really stretching overhead, but I don't think it would cause anything permanent." (VK at 13). Dr. Korhonen did not believe that Mr. Vazquez was a surgical candidate. (VK2 at 15).

Dr. Korhonen testified that his opinions regarding causation, particularly page 12 of the prior deposition transcript, have not been altered in light of the second evaluation. (VK2 at 17).

ARGUMENT I

ILLEGAL ALIENS ARE NOT ENTITLED TO BENEFITS UNDER THE MICHIGAN WORKER'S DISABILITY COMPENSATION ACT.

Section 161(l) of the Act defines an employee under the Act as follows:

> **Every person in the service of another, under any contract of hire, express or implied, *including aliens*; . . . .**
> (Italics added).

The magistrate concluded that illegal aliens are included under the coverage of the act. The magistrate found as follows:

> With the exception of out-of-state cases that have no precedential value and are not necessarily consistent with the Michigan Workers' Disability Compensation Act, neither party sets forth legal authority. General statutory construction, however, holds that general language is inclusive, rather than exclusive. The only circumstance where the Act directly deals with the hiring of illegal employees is the section dealing with minors. MCLA 418.161(l). The statute provides that if an employer hires a minor and the employment is illegal, the employer is still obligated to pay benefits at double the normal rate. Even when the documents used to gain illegal employment are fraudulent, the illegality of the hire does not relieve the employer of liability. I do not find that the language of Section 161 excludes illegal aliens from the protections offered under Michigan's Workers' Compensation Statute.

The Appellate Commission and Court of Appeals affirmed the finding of the magistrate that illegal aliens are included in the Act. It is important to note that this is an issue of first impression in Michigan.

While Section 161(1) does include the phrase "including aliens," the legislature was speaking to legal aliens in the context of the definition of an employee. The magistrate and

the Appellate Commission argued by analogy that because illegal minors are entitled to benefits that illegal aliens are as well. That analogy is misplaced. The very fact that the legislature had the foresight to specifically include illegal minors as well as legal minors speaks volumes to the fact that the legislature did not specifically include illegal aliens in section 161(1).

This is a classic application of the maxim *expressio unius est exclusio alterius. Stowers v Wolodzko*, 386 Mich 119 (1971). Furthermore, in the case of illegal minors there are overriding public policy concerns that support the protection of minors. The same public policy concerns do not attach themselves to illegal aliens.

The magistrate and commission also overlooked the fact that illegal minors receive double benefits only if they do not participate in the "fraudulent use of permits or certificates of age." MCLA 418.161(l). Even minors are limited in recovery of benefits if they commit fraud.

The plaintiff Sanchez admits that he committed fraud! Plaintiff Sanchez testified that upon arriving in California he purchased a fake social security card for $30 (ST 17; Appendix 9). He thereafter fraudulently obtained a California driver's license. (ST 28; Appendix 9) Plaintiff Sanchez freely acknowledged at trial that he is an illegal alien. *id.*

Upon his arrival in Michigan, the Plaintiff provided Eagle Alloy false documentation and commenced full-time employment at Eagle Alloy in March 1997. He worked simultaneously at West Michigan Steel.

Each employer was provided with a copy of the Plaintiff's fraudulent social security card and fraudulent California driver's license as proof of his legal resident status. He also

signed an employment form stating that "under penalty of perjury" he was a "lawful permanent resident" of the United States. (Appendix 11, 12).

Likewise, Mr. Vazquez immediately conceded that he does not have a valid Social Security number. (Appendix 14, 15). Plaintiff testified that he has been in America for four years. (Appendix 16). He came to America through Tijuana and into California where he purchased a fake Social Security card. Thereafter, he purchased a fake alien card in Chicago, Illinois. (Appendix 16). Mr. Vazquez conceded that he provided the fake Resident Alien Card and fake Social Security card to Eagle Alloy as part of his application for employment. (Appendix 15). Mr. Vazquez conceded that these cards are not true. *Id.*

Mr. Vazquez conceded that he knew he was an illegal alien when he advised Eagle Alloy that he wanted to work for them. (Appendix 16). He presented the two cards to Eagle Alloy so they would think that he was a legal resident alien and he wanted Eagle Alloy to believe that these cards were valid. *Id.*

It is not lawfully possible for an employer to hire an illegal alien, because federal law prohibits it. 8 USC 1324(a). Therefore, the only way for an illegal alien to obtain employment is to commit fraud. Certainly, the legislature did not intend to include illegal aliens as employees under the Act because illegal aliens are not lawfully employable pursuant to federal law.

The Appellate Commission noted that the word alien has been present in the statute since 1912 and despite 24 amendments to this general section the word has not been modified. The Commission believed that this is "legislative inaction" on the question of illegal aliens and that therefore it supports the argument that illegal aliens are included. It is the defendant's position that the legislature's language did not include illegal aliens in 1912

and it is not included in the present provision. One reason there has been no bright line clarification by the legislature is because the Michigan Judiciary has never addressed the issue.

While IRCA was inacted after the implementation of section 161, it stands to reason the legislature would not include illegal aliens under the Worker's Compensation Act because Congress is the legislative body that deals with legislation concerning illegal aliens. Article I of the United States Constitution contains no express reference to immigration among its enumeration of delegated powers; however, for more than a century, it has been acknowledged that Congress possesses authority over immigration policy as "an incident of sovereignty." *Chae Chan Ping* v *United States*, U.S. 581 (1889). The Supreme Court has called Congress's inherent immigration power "plenary." *See Kleindienst* v *Mandel,* 408 U.S. 753, (1972) The ninth circuit court of appeals has deemed it "sweeping." *See Catholic Social Servs.*v *Reno*, 134 F.3d 921 (9th Cir. 1998). Whatever the label, all agree that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v Bell*, 430 U.S. 787 (1977) (quoting *Oceanic Navigation Co. v Stranahan*, 214 U.S. 320, 339 (1909)).

It is not probable that the Michigan Legislature would include illegal aliens under the Michigan Worker's Disability Compensation Act, when Congress (who has plenary legislative control) has made it unlawful for illegal aliens to be employed in the United States. Legislative inaction subsequent to the implementation of IRCA is note worthy in that it lends credence to the argument that the Act has always been consistent with the policies behind IRCA and that illegal aliens are not covered under the Act.

The Court of Appeals relied on the definition found in Blacks Law Dictionary in support of its finding "alien" as used in the act includes illegal aliens. The definition used by Blacks Law Dictionary and cited by the court does not indicate whether the definition of "alien" includes those "foreign born citizen[s]" *without legal employment status*. The defendant agrees that "alien" includes foreign born citizens who have not qualified as a citizen of this country, but *have obtained legal employment status*. However, the distinction must be made between aliens with legal employment status and those without. The court of appeal's statutory construction fails in that regard.

Defendant also thinks it important to note that illegal aliens are not entitled to benefits under the Michigan: Family Independence Program, State Disability Program, Food Stamp Program, or the State Medical Program. *See Michigan Program Eligibility Manual* 225. This lends further credence to defendant's argument that the legislature did not intend to include unauthorized aliens under the coverage of the Act.

Defendant's argument is perhaps best enumerated by Worker's Compensation Appellate Chairperson Jurgen O. Skoppek in the WCAC's recent enbanc decision in *Vazquez v Eagle Alloy*, 2002 ACO #24 ((Appendix 13) (holding that illegal aliens are not entitled to benefits pursuant to section 361(1), because they are unable to obtain work due to commission of a crime)). Chairperson Skoppek stated, ". . . .I should begin by noting my basic legal philosophical attitude concerning the appropriateness of Mr. Vazquez taking recourse to the Michigan worker's compensation statute. I believe that plaintiff's improper, legally unsanctioned presence and performance of work in this country demonstrates a rejection of the rule of law. I do not believe that someone who comprehensively rejects the

rule of law, as has the plaintiff in this case, should have the recourse to the privileges and benefits of the very same law he has rejected.

Thus when the Michigan worker's compensation act includes 'aliens' as employees under Section 161, the term should be understood within the context of the act as an expression of law. If illegal acts or illegal status are contemplated, the legislature knows full well how to incorporate such illegality and its consequences into the law. When as in Section 161, the legislature is silent, it only makes sense to interpret a term such as 'aliens' to be a reference to legally recognized aliens. Individuals who have no legal right to be here are not contemplated by the term. Hence illegal aliens cannot be employees as defined by the Act." *Vazquez, supra* at 31.

In addition, this Court must recognize that if the legislature did intend to include illegal aliens in Section 161 then they intended to take away the employer's most basic right to mitigate damage by finding reasonable employment for a disabled worker. Clearly, the legislature did not intend this.

Even if this honorable court concludes that the Michigan legislature did include illegal aliens under the Act, *Hoffman v NLRB*, 535 U.S. 137 (2002) and IRCA preempts their entitlement to benefits because as a requisite to receiving benefits a person must first be an employee and Federal Law prohibits illegal aliens from becoming lawful employees.

An alien who is not authorized to work by the United States Department of Justice, and Immigration and Naturalization Service cannot be an "employee" under the Michigan Worker's Compensation Act.

In *Hoffman*, Jose Castro was hired by Hoffman Plastic to operate various blending machines that mix the particular formulas per customer order. Before being hired for this position, Castro presented documents that appeared to verify his authorization to work in the United States. Subsequently, Castro and several employees were laid off for supporting union activities.

The National Labor Relations Board (NLRB) initially found that Hoffman unlawfully selected four employees, including Castro, for layoff. As part of the remedy the NLRB awarded Castro and the other employees backpay.

The parties then proceeded to a compliance hearing before an ALJ to determine the amount of backpay due. "On the final day of hearing, Castro testified that he was born in Mexico and that he had never been legally admitted to, or authorized to work in the United States. He admitted gaining employment with Hoffman only after tendering a birth certificate belonging to a friend who was born in Texas. He also admitted that he used this birth certificate to fraudulently obtain a California driver's license and a Social Security card, and to fraudulently obtain employment following his layoff by Hoffman." *Hoffman, supra* (citations omitted). Based on this testimony the ALJ found that the Board was precluded from awarding backpay or reinstatement because it would be contrary to *Sure-Tan, Inc. v NLRB*, 467 U.S. 883 (1984), and in conflict with the IRCA, which makes it unlawful for employees to knowingly hire undocumented workers and for employees to use fraudulent documents to establish eligibility.

Four years later the NLRB reversed with respect to backpay. The Supreme Court then granted certiorari, and reversed the award. The court explained that:

> IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. §

> 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).
>
> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker [*21] upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions. *Hoffman, supra.*

The Supreme Court also found that "[u]nder the IRCA regime, it is impossible for and undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. . . We therefore concluded that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed by IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations" *Hoffman, supra.*

First, the Court recognized that a line of its prior decisions firmly established the principle that where a chosen remedy infringed upon a federal statute or policy that remedy may be required to yield. The Court next recited a history of IRCA as "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Id.* at 149.

The Court further explained that to allow an award of back pay would require it to ignore this fact and allow an award of back pay to an illegal alien for years of work not

performed, for wages not lawfully earned, and for a job obtained in the first instance by a criminal act.

The Court also addressed the argument that to deny benefits to undocumented workers allows employers to get of "scott free" for their actions, and serves as incentive to engage in further prohibited hiring practices. Instead, the Court specifically cited the fact that the law provides significant penalties and potential criminal prosecutions for the actions. *Id.* at 152. The Court held that these "traditional remedies" to punish wayword employers sufficient to effectuate national policy. *Id.*

In conclusion, the Court acknowledged that an award to an illegal alien "not only trivializes the immigration laws, it also condones and encourages future violations."*Id.* at 150. The employee was only eligible for the award due to his illegal presence here. Considering an award or payment might span years, it is no small inducement to prolong the illegal presence. *Id.* Also, as noted above the employee cannot mitigate his damages without triggering new IRCA violations. Such tension is important when determining remedies to undocumented workers. Thus, the Court held that allowing the administrative award to illegal aliens unduly entrenched upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would condone the evasion of apprehension by immigration authorities, condone prior violations of the law, and encourage future violations. *Id.* at 151. Thus, no matter how broad an agencies' discretion to fashion remedies, it is not so "unbound" as to authorize such an award. *Id.* Based on the above the Court denied the worker his remedy.

The defendant acknowledges that some courts have been remiss to apply *Hoffman*. *See Correa v Waymouth Farms*, 664 N.W. 2d 324 (2003) (finding that state was not

preempted from awarding workers' compensation benefits to illegal alien); *Safeharbor v Cinto Velezquez*, Fla.App. 1 Dist., 2003 (finding that state was not preempted from awarding workers' compensation benefits to illegal alien); *Flores v Albertsons Inc.*, 2002 U.S. Dist. Lexis 6171 (C.D. Cal. 2002); *Singh v Jutla*, 2002 U.S. District Lexis 14978 (N.D. Cal. 2002).

However, these rulings do not comport with *Hoffman*, IRCA, and the "changed legal landscape" and noted by the Supreme Court. IRCA applies to all employment issues and the Court's interpretation of IRCA's policies, prohibitions and provisions in the *Hoffman* opinion should have equal force when applied to workers' compensation.

Of importance, the Supreme Court carefully weighed the two risks inherent in undocumented worker situations. First, there is the risk that the employer would be encouraged to hire undocumented workers if there is no accountability for wage payments. This argument has been proffered by the plaintiffs in the case at bar, stating that employers benefit from the employee's services, and the employers should therefore be responsible for benefits when they are injured. The second risk is that, in the NLRA context, benefits would attract undocumented workers into the United States. The Supreme Court held that employers are already deterred by the IRCA sanctions and need no further deterrence. However, providing benefits would in fact create an incentive for undocumented workers to further undermine federal law by remaining in the United States. Thus, in order to avoid future federal law violations, undocumented workers should not be given such encouragement. An undocumented worker would have a greater incentive to work in the United States, knowing that an injury in the workplace means potential permanent pay checks. Further, there was absolutely no finding in this case of any "unclean" hands or wrongdoing by the employer.

The provision of benefits under the workers' disability compensation act is analogous to the award of back pay at issue in *Hoffman*. Under workers' compensation law, as in the award granted to the employee in *Hoffman*, an illegal alien is being compensated for loss of income sustained at a time that he is not working, for wages he can not legally earn, and for a job obtained through criminal fraud. An injured worker is paid indemnity benefits to replace his pay while out of work, just like the award of back pay in *Hoffman*. In both instances, the employee is not working due to his on the job activities, all of which were occasioned by his procurement of the job by criminal fraud. As such, awarding workers' compensation benefits would contradict the policies underlying IRCA. There is no authority to award such a remedy or enforce such a law beyond its remedial discretion based on the rational expressed in *Hoffman*.

As noted above, if illegal aliens are included under the Act, and IRCA and *Hoffman* do not preempt an award of benefits under the Act, then by including illegal aliens under the coverage of the Act, the employer and the employee would have lost the fundemental right to mitigate plaintiff' damages.

Therefore, the defendant respectfully requests that this honorable court find that the illegal aliens are not included within the "meaning" of the word "alien" under section 161(1)(l).

ARGUMENT II

DUE TO THEIR MISREPRESENTATIONS AND FRAUD, PLAINTIFFS DAVID SANCHEZ AND ALEJANDRO VAZQUEZ DID NOT ENTER INTO A VALID CONTRACT OF HIRE WITH EAGLE ALLOY AND THEREFORE CANNOT BE ENTITLED TO ANY WORKERS' COMPENSATION BENEFITS.

Magistrate Donna Grit found that the Plaintiff Sanchez was hired by both West Michigan Steel and Eagle Alloy. (Appendix 1, at 11) The Magistrate points out that Eagle Alloy's Connie Larson testified that the Plaintiff had been an excellent "employee." (Appendix 1, at 11) However, it should be emphasized that Ms. Larson understood there to be an employment contract based upon her incomplete knowledge of Plaintiff Sanchez's illegal alien status. Had the Plaintiff accurately advised her initially, she certainly would not have considered him an employee, as borne out by subsequent events. Federal law, at 8 USC Section 1324(a), clearly states that an illegal alien cannot be lawfully employed. The plaintiff Sanchez acknowledged being illegally in the United States the entire time and this statute prevents him from legally entering into an employment contract.

The unrebutted proofs at the time of trial were that plaintiff Vazquez was an illegal alien at all times during his employment at Eagle Alloy, originally entering this country by Tijuana approximately four years ago. Mr. Vazquez purchased a fraudulent Social Security card and later a fraudulent Resident Alien card. Mr. Vazquez has admitted that these documents were untruthful and that he intentionally misrepresented his status to Eagle Alloy when he presented himself as a legal resident. Mr. Vazquez indicated that he presented these false documents, which he knew to be false, to Eagle Alloy for the purposes of obtaining

employment. Ms. Connie Larson testified that he was hired based upon this misrepresentation.

Ms. Larson testified that she was the office manager of Eagle Alloy at the time Mr. Vazquez was hired. The false documents presented by Mr. Vazquez were assumed to be truthful and he was hired based upon this misrepresentation.

Thus, it follows that there has at no point been an employment contract and the plaintiffs have never been legal employees of the defendant. Any purported employment contract was based on misrepresentation and fraud, thereby rendering it void.

Section 418.161(1) (L) of the Michigan Workers' Compensation Act defines an employee as "Every person in the service of another, under any contract of hire, express or implied, including aliens . . ." While Section 161(1) (L) does include the phrase "including aliens," the legislature was speaking to legal aliens in the context of the definition of an employee. As discussed in defendant's first argument, there is no indication whatsoever that the legislature was attempting, contrary to federal law, to create an entitlement for illegal aliens. It would be illogical for the legislature to include illegal aliens, when Federal Law prohibits their employment. The plaintiff was hired only upon the presentation of fake documents.

Given the dearth of Michigan cases on point, attention should be given to authority from other states that have addressed this issue of employment. Virginia addressed the issue in *Granados* v *Windson Development*, 519 SE2d 290 (VA 1999) and their statute is the most similar to Michigan's, among the states that have addressed this issue. There, the factual scenario involved an illegal alien providing false immigration and social security documentation to the employer. At trial, the employer indicated that it would not have hired

the plaintiff if it had known that he was an illegal alien. The Virginia Supreme Court held that the plaintiff was not an employee because he did not fit the definition. Virginia's definition of an employee, which is almost identical to Michigan's, including "Every person, including a minor, in the service of another under a contract of hire."

The Virginia Supreme Court reasoned that there was no contract of hire, because under the Federal Immigration Reform and Control Act of 1986 an illegal alien cannot be employed lawfully in the United States. There was never a contract of hire formed because the *plaintiff lacked the capacity* to enter into such a contract. Thus, Plaintiff Granados was denied benefits because he did not demonstrate that he was an employee under the Act. Similarly, plaintiffs Sanchez and Vazquez should be denied benefits for their failure to demonstrate that they were employees under the Act.

The dissenting Commissioners in *Vazquez, supra* seemed to think it important that the legislature in Virginia "overruled that holding by modifying its Worker's Disability Compensation Act to expressly include illegal aliens." Defendant also thinks that this is very important. If the Michigan Legislature sees fit to expressly include illegal aliens as did Virginia's legislature it may do so. But until such time, the Michigan Courts are bound by the same constitutional restraints as the Virginia Supreme Court. Namely, the separation of powers.

Recent Michigan Supreme Court jurisprudence provides that a **contract of hire** is a precondition for receiving benefits under the Workers' Compensation Act. *Hoste* v *Shanty Creek Management, Inc.*, 459 Michigan 561 (1999). Implicit in the contract of hire is a meeting of the minds resulting in mutual benefit; for the employer services provided and for the employee compensation for such labor. The court of appeals found that because the

defendant received the benefits of plaintiff's work, there was an implied meeting of the minds. The Court of Appeals reasoning would potentially allow an award of benefits for wages not lawfully earned, and for a job obtained in the first instance by a criminal act. *Hoffman, supra* at 149.

Mutuality of agreement, i.e. meeting of the minds, means "[t]here must be a meeting on all material facts in order to form a valid agreement . . ." *Sanchez*, 254 Mich at 657 (quoting *Groulx* v *Carlson*, 176 Mich App 484 (1989)).

Certainly, one of the material facts to form a valid contract of hire is the legal capacity to enter into the agreement at the outset. The plaintiffs had no such capacity. The plaintiffs in this matter fraudulently and illegally misrepresented their employment status. Performance of work for the defendant is a crime. *Hoffman, supra*. Contrary, to the court of appeal's finding, the defendant did not acquiesce to plaintiffs' performance of work. The defendant was **defrauded**.

> **Plaintiff's fraudulent misrepresentation of a legal right to perform work goes to the very essence and heart of the relationship between employee and employer. There cannot be a contract of hire when one of the parties is not legally permitted to enter into that contract.** *Vazquez, supra* at 31, FN 1.

To summarize, for there to be an employment relationship there must be a contract of hire. *Hoste, supra*. In this case there is no contract of hire within the meaning of section 161(l).

In the case of *Kruchkowski v Polonia Pub Co.*, 203 Mich at 211, 217 (1918) this court held that "a contract which is illegal, or in violation of a statute" will not suffice to constitute a valid contractual relation. Therefore, a person will not be considered an employee under the

act because a valid contract of employment is a statutory requirement such that a person may be an employee under the act. *Id.* at 218.

Plaintiffs cannot be legally employed in the United States of America because he is an illegal alien and federal law prohibits his employment. 8 USC 1324(a) It follows, that if he cannot legally be employed under federal law; he can not legally be an employee under the Michigan Worker's Compensation Disability Act because there can be no valid contractual relation or contract of hire.

Because, plaintiffs do not qualify as an employee under section 161(l) of the Act they are not entitled to benefits. Also, any contract of hire was void *ab intitio* because of fraud. *UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486; *Samuel D Begola Services, Inc., v Wild Bros*, 210 Mich App 636 (1995). Furthermore, as noted above there was no contract of hire because there was no "meeting of the minds." *Id.* Clearly, the employer would not, and in fact could not have legally allowed the plaintiff to perform job activities had it known of plaintiff's illegal status. Plaintiff's procurement of the job was by criminal fraud.

ARGUMENT III

PLAINTIFFS SANCHEZ AND VAZQUEZ ARE PRECLUDED FROM RECEIVING WORKERS' COMPENSATION WAGE LOSS BENEFITS PURSUANT TO SECTION 361 OF THE WORKERS' COMPENSATION ACT.

Section 361(1) of the workers' disability compensation act provides in pertinent part as follows:

> "[A]n employer shall not be liable for compensation under Section 351, 371(1) or this section for such periods of time as the employee is *unable to work because of imprisonment or commission of a crime*." (Emphasis added)

In both Sanchez and Vazquez, the Magistrate awarded the plaintiff a closed period of weekly wage loss benefits through the date on which their illegal employment status was discovered by the employer. The Magistrate also ordered Eagle Alloy to pay for all reasonable and necessary medical treatment pursuant to MCL 418.315. The Magistrate reasoned that Sanchez's and Vazquez's wage loss benefits were forfeited on the date that their illegal employment status was discovered under Section 361(1), which provides in part that "an employer shall not be liable for compensation . . . for such periods of time that the employee is unable to obtain or perform work because of . . . commission of a crime." MCL 418.361(1).

On appeal, in Sanchez the Workers' Compensation Appellate Commission (WCAC) reversed the Magistrate's decision to forfeit benefits pursuant to Section 361(1). The Commission reasoned that it was not a "crime" for an employee to be working in this country as an undocumented alien. (Sanchez was decided by a three person panel of Commissioners).

Vazquez was heard by all seven Commissioners of the Workers' Compensation Appellate Commission. The majority of Commissioners held that it is a "crime" within the meaning of the Workers' Disability Compensation Act, specifically Section 361(1) for an undocumented alien to obtain or perform work. Therefore, the WCAC held plaintiff's benefits suspended for the period of time that he must violate the law to obtain or perform work. As an undocumented alien cannot obtain or perform work in the United States without violating the law, the Commission ruled that Section 361 precludes the receipt of wage loss benefits. The Commission explained further that if the plaintiff were to correct his undocumented status by obtaining permission to live and work in the United States, Section 361 would no longer suspend benefits.

Both Sanchez and Vasquez were appealed to the Michigan Court of Appeals. Since the issues in both cases were essentially identical, the Court of Appeals consolidated the two cases. On January 7, 2003, the Michigan Court of Appeals held that both Sanchez and Vazquez's admitted use of fake documents to obtain employment constituted "commission of a crime." However, the Court of Appeals agreed with the Magistrate's reasoning that benefits were only suspended from the date the employer actually learned of the employee's illegal status.

The defendant reiterates and adopts the holding and legal reasoning of the controlling opinion in *Vazquez*, 2002 ACO #24 as part of its argument, as follows:

"This case demands the most careful balancing of competing interests. Clearly, the law from other jurisdictions favors allowing eligibility for worker's compensation benefits to undocumented aliens. However, we are keenly aware that we should not interpret our statute with undue leniency such that it encourages undocumented aliens to violate the law. In

addition, we recognize that we must protect an employer's right to mitigate damage by finding reasonable employment for a disabled worker. Against that protection, we must also consider whether an interpretation of our statute encourages employers to violate federal laws or to avoid the basic responsibility to bear the costs for workplace injuries.

We balance these same interests as we review the magistrate's application of section 361. We agree with the dissenting opinion that an undocumented worker does not violate criminal law by *performing* work in every instance. However, we note that the same undocumented worker must commit multiple crimes in order *to obtain* that same work. The federal government mandates the completion of several forms preceding employment. For, example, the magistrate mentions the I-9 form which requires all workers to verify their legal capacity to obtain work in the United States. If a person falsifies information on the I-9, 18 USC 1001 states that the person commits a felony and subjects himself to 5 years in prison. Similarly, the W-4 form requires jobseekers to list their social security number. Again, 18 USC 1001 criminalizes the falsification of that information. The W-4 form also independently requires an oath verifying the jobseeker's number of dependants and subjects a person to criminal penalty for falsifying that information. In the same fashion, Michigan created a perjury statute, MCL 750.423, that criminalizes false statements made under oath to Michigan agencies. When all crimes are considered, an undocumented worker subjects himself to more than 30 years of imprisonment if he attempts to obtain work.

Alternatively, if a worker attempts to work without providing the information on the federally mandated forms, the worker violates a different set of statutes by performing the work. We commonly refer to such as employment as "working under the table". That work requires several illegal acts, all related to the absence of a legal tax status declaration. 26

USC 7201 provides criminal penalty for any person who even attempts to evade taxes and also includes those who successfully evade tax payment. In the same way, Michigan provides similar prohibitions in MCL 205.27, which also subjects violaters to imprisonment.

Federal law requires workers to declare their accurate social security number, which federal agencies commonly reference as an account number. Federal law punishes those who intentionally supply a false social security number. It also punishes those who attempt to work without declaring a social security number.

In summary, the magistrate correctly ruled that the laws of this state and the laws of the United States make an undocumented worker's employment impossible without committing a crime. Section 361 mandates that an undocumented alien's benefits are suspended during the period of his undocumented status. While an alien has undocumented status, he cannot obtain work without committing multiple crimes. The plain language of section 361 suspends a worker's benefits when he is unable to obtain work because of the commission of a crime.

We specifically note that our interpretation offers the undocumented alien protection from the potential negative consequences of the reasonable employment provisions of the statute. MCL 418.301(5) permits employers to find reasonable employment for injured workers. That employment can be with any employer capable of providing employment that honors an injured worker's limitations. However, as we just detailed, the undocumented worker would be forced to commit multiple crimes if the accepted the reasonable employment. Conversly, if the undocumented worker refused the reasonable employment, section 301(5)(a) allows the employer to suspend the benefits during the period of refusal.

Thus, our interpretation of the statute protects the uninformed alien from having to commit crimes when attempting to honor his obligation to accept reasonable employment.

In addition, we note that the suspension of benefits under section 361 ends when plaintiff can work without violating the law. For example, if plaintiff were to correct his undocumented status by obtaining proper permission to live and work in the United States, section 361 would no longer suspend his benefits.

Because we suspend plaintiff's benefits only for the period that he must violate the law to obtain or perform work, we provide an interpretation of the law that discourages further violations of the law. Undocumented workers know that our system will not support their continued violations of the law. Unscrupulous employers know that they may be liable for a lifetime of benefits if an undocumented worker is injured on the job and know that they must pay for all medical benefits.

As applied to this plaintiff, section 361 suspends benefits. Plaintiff necessarily has violated and will violate criminal laws when he obtains or performs work. If plaintiff offers his fictitious social security number on the required forms, he violates 18 USC 1001, and 42 USC 408 multiple times. If he refuses to provide the social security number, he violates provisions of the tax code.

Section 361 can be logically and reasonably applied to the claimant in this case. Benefits must be denied accordingly." *Vazquez, supra* at 32,33.

Plaintiff argues that violation of the above referenced federal statutes do not constitute crimes as defined by the Michigan Legislature. This is absurd. The Michigan Legislature defines a crime in MCLA 750.5, which provides:

> "Crime" means an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following:
> (a)Imprisonment.
> (b)Fine not designated by civil fine.
> (c)Removal from office.
> (d)Disqualification to hold an office of trust, honor, or profit under the state.
> (e)Other penal discipline.

There is no question that violation of the above statutes constitutes a crime as defined by the Michigan Legislature. Each of the above statutes forbid certain acts or omissions and are punishable by either fine (not designated by civil fine) or imprisonment.

Furthermore, in the recent case of *Hoffman* the court explained that:

> IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).
>
> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker [*21] upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions. *Hoffman, supra.*

Likewise there is no dispute that Sanchez's and Vazquez's use of false documents to obtain employment with Eagle Alloy was in direct violation of the law. Furthermore, Sanchez and Vazquez cannot obtain employment without violating the law.

The Supreme Court also found that "[u]nder the IRCA regime, it is impossible for and undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. . . We therefore concluded that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed by IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations" *Hoffman, supra.*

The policy concerns are no different in our case. Awarding Sanchez or Vazquez worker's compensation benefits would condone future violations and subvert IRCA. More importantly the Supreme Court in *Hoffman* made it clear that an undocumented alien cannot obtain employment without committing a crime.

The unrebutted proofs at the time of trial were that plaintiffs Sanchez and Vazquez were illegal aliens at all times during their employment at Eagle Alloy.

B. The Court of Appeals incorrectly determined that the Plaintiff's should receive benefits until such time as their undocumented status is discovered.

The court of appeals held that benefits should only suspended from the date the employer actually learned of the employee's illegal status. The court's decision awarding benefits until such time as the employer discovers the plaintiffs' fraud was erroneous, arbitrary and must be reversed.

Wage loss benefits should not be due and owing at any time until a person has the legal capacity to perform or obtain work. In other words, the employer should not have to pay benefits until such time as they learn of the criminal act, while the plaintiffs continue their deceit and fraud.

The defendant is only aware of one case where the term "unable to perform" was interpreted by the appellate courts. In *Barret* v *Aluminum & Brass Company*, 69 Mich App 636 (1976), the court found that the "Legislature used the term 'unable to perform' in terms of the economic result of a physical or mental impairment rather than in purely mechanical terms." In other words what is the economic reality of the situation. The court in Barret explains that just because you are working at a single job does not mean you are able to perform all jobs within your qualifications and training. Likewise, working at a single job does not mean that you are **not** "unable to perform" work within the meaning of the Act.

The economic reality of the cases at bar is that neither plaintiff is unable to obtain or perform work because of commission of a crime, from day one, not the day that their illegal status is discovered. The economic reality is that Plaintiffs cannot **obtain or perform** work without the commission of a crime. Benefits should be suspended not from the date of discovery but for all periods of time until the plaintiffs are able to obtain or perform work without the commission of a crime. Plaintiffs should not be able to commit a criminal act and obtain financial gain, until such time as the criminal act is discovered. Without the ability to lawfully obtain a job and to still get benefits would actually provide the undocumented worker greater benefits than someone who is a naturalized citizen of the United States.

RELIEF REQUESTED

Defendant-Cross-Appellant Eagle Alloy, Inc. respectfully requests that Oral Arguments be granted. We believe the issues in this case warrant oral argument.

We also ask that based on the foregoing arguments this Honorable Court reverse the decision of the court of appeals and deny plaintiff's application for benefits.

Alternatively, the defendant asks that this Honorable Court modify the court's decision suspending benefits for all periods until such time as plaintiffs obtain proper permission to live and work in the United States.

Respectfully submitted,

BLEAKLEY, CYPHER, PARENT, WARREN & QUINN, P.C.

Dated: December 23, 2003

By James Helminski

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